

January 25, 1999

Ms. Joni M. Vollman
Assistant General Counsel
Harris County District Attorney
201 Fannin, Suite 200
Houston, Texas 77002-1901



OFFICE OF THE
ATTORNEY GENERAL
STATE OF TEXAS

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JOHN CORNYN
Attorney General

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P.O. Box 12548
Austin, Texas
78711-2548

(512) 463-2100
www.oag.state.tx.us

OR99-0229

Dear Ms. Vollman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 121233.

The Harris County District Attorney received a request for all files and records concerning the arrest, investigation, and trial of cause numbers 9403932-4 and 9408717. You indicate that you will release some of the requested information to the requestor. You argue, however, that five categories of information, submitted as Exhibits A - E, are excepted from required public disclosure by sections 552.101, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted sample documents.¹

You first argue that the information in Exhibit A is excepted from disclosure by section 552.108. Section 552.108 of the Government Code provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

* * *

(3) it is information that:

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988); 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation;

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

* * *

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why section 552.108 is applicable. *See* Gov't Code §§ 552.108, .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You explain the documents in Exhibit A constitute the prosecutor's work product. You state that the information you seek to withhold in Exhibit A consists of the "handwritten notes of prosecutors and the cover folder of the prosecutor's file, which contains handwritten notes of the prosecutors, the D.I.M.S. sheet, and state copies and draft copies of subpoenas that have handwritten notations on them (clean copies of the subpoenas are provided to the requestor). After examining Exhibit A, it appears that the information you seek to withhold was prepared by an attorney representing the state in criminal litigation. The information you seek to withhold in Exhibit A is protected from disclosure under section 552.108(a)(3)(A).

You assert that the material in Exhibit B must be withheld under section 552.101. Section 552.101 of the Government Code excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.*

§ 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, any CHRI in your possession that falls within the ambit of these state and federal regulations must be withheld.

You next contend that the victim impact statements in Exhibit C are confidential pursuant to section 18(a) of article 42.18 of the Code of Criminal Procedure. Section 18(a) of article 42.18 of the Code of Criminal Procedure has been recodified and is now section 508.313 of the Government Code. Section 508.313 of the Government Code provides:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a release; or

(3) a person directly identified in any proposed plan of release for an inmate.

This provision accords confidentiality to the records of the Board of Pardons and Paroles. Open Records Decision No. 190 at 2 (1978); *see also* Attorney General Opinion H-427 (1974); Open Records Decision No. 33 (1974). It does not, however, make confidential records in the custody of the district attorney. Thus, the victim impact statements are not confidential pursuant to section 508.313 of the Government Code.

Notwithstanding the above, a marked portion of Exhibit C here contains information excepted from public disclosure by a right of privacy under section 552.101. Section 552.101 encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its

disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). We have marked the portion that must be withheld. Except for this marked material, the information in Exhibit C must be released.

You argue that the information contained in Exhibit D must be withheld because it consists of confidential medical records. You state that these records are covered by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. This statute provides:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, access to the medical records at issue is not governed by chapter 552 of the Government Code, but rather provisions of the MPA. Open Records Decision No. 598 (1991). The submissions to this office appear to contain medical records and communications that are confidential and may be disclosed only in accordance with the MPA. *See* V.T.C.S. art. 4495b, § 5.08(a), (b), (c), (j); Open Records Decision Nos. 598 (1991), 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay constitute protected MPA records). You must release the medical records in Exhibit D only in accordance with the MPA.

Finally, you claim that the information in Exhibit E which reflects police officers' home phone numbers and addresses is excepted from disclosure under section 552.117 of the Government Code. Section 552.117 of the Government Code provides that information may be withheld if it is:

information that relates to the home address, home telephone number, social security number, or that reveals whether the following person has family members:

* * * *

(2) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code.

You must, therefore, withhold the peace officers' home addresses and home telephone numbers. Open Records Decision Nos. 532 (1989), 530 (1989).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Don Ballard".

Don Ballard
Assistant Attorney General
Open Records Division

JDB\nc

Ref: ID# 121233

Enclosures: Submitted documents

cc: Mr. Michael Charlton
3200 Southwest Freeway, Suite 1120
Houston, Texas 77027
(w/o enclosures)